69

Supreme Court, U.S.
FILED
SEP 17 2007
OFFICE OF THE CLERK

No. (1) 07-376

In The

Supreme Court of the United States

SPENCER DIESEL INJECTION & TURBO, INC.,

Petitioner,

vs.

THE CITY OF SIOUX CITY, IOWA,
a Municipal Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Iowa

PETITION FOR WRIT OF CERTIORARI

MUNGER, REINSCHMIDT & DENNE, L.L.P.
STANLEY E. MUNGER, *Counsel of Record*
600 Fourth Street
303 Terra Centre
P.O. Box 912
Sioux City, IA 51102
(712) 233-3635

Attorneys for Petitioner
Spencer Diesel Injection & Turbo, Inc.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

1. Whether the Iowa Court of Appeals denied Petitioner just compensation pursuant to the Fifth Amendment to the United States Constitution for private property taken for public use.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties appear in the caption of the case on the cover page. Petitioner Spencer Diesel Injection & Turbo, Inc., does not have a parent company, and no publicly held company owns 10% or more of the corporation's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	14

INDEX TO APPENDICES

Opinion of Iowa Court of Appeals (April 25, 2007) ..... App. 1

Order and Judgment of Iowa District Court for Woodbury County (March 2, 2006) ..... App. 16

Order of Iowa Supreme Court (June 19, 2007) .. App. 28

TABLE OF AUTHORITIES

Page

CASES:

Comstock v. Iowa State Highway Commission, 254 Iowa 1301, 121 N.W.2d 205 (1963) 13

McCandless v. United States, 298 U.S. 342, 56 S.Ct. 764, 80 L.Ed.2d 1205 (1936) 11

Monongahela Navigation Company v. United States, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893) 11, 12

Montgomery County v. Bridge Company, 110 Penn. St. 54, 20 A. 407 (Pa. 1885) 12

Olson v. United States, 292 U.S. 246 (1934) 10, 11

Spencer Diesel Injection & Turbo, Inc. v. The City of Sioux City, Iowa, 2007 Iowa App. LEXIS 535 (Iowa Ct. App. April 25, 2007) 1

United States v. Commodities Trading Corp., 339 U.S. 121 (1950) 11

United States v. 564.54 Acres of Land, 441 U.S. 506, 99 S.Ct. 1854, 60 L.Ed.2d 435 (1979) 10, 11

CONSTITUTIONS:

U.S. Const. amend. V 2

STATUTES:

28 U.S.C. § 1257 2

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF IOWA

The Petitioner, Spencer Diesel Injection & Turbo, Inc. (hereinafter "Spencer Diesel"), respectfully prays that a writ of certiorari issue to review the Judgment of the Iowa Supreme Court entered on June 19, 2007, and of the Iowa Court of Appeals entered on April 25, 2007, in Case Number 06-0494.

OPINIONS BELOW

On March 2, 2006, the Iowa District Court for Woodbury County entered its Order and Judgment, and said opinion is filed herewith in the Appendix at pages 16-27. Spencer Diesel filed a timely notice of appeal, and on April 25, 2007, the Iowa Court of Appeals affirmed the decision of the Iowa District Court, and said opinion is filed herewith in the Appendix at pages 1-15. *See Spencer Diesel Injection & Turbo, Inc. v. The City of Sioux City, Iowa*, 2007 Iowa App. LEXIS 535 (Iowa Ct. App. April 25, 2007). Spencer Diesel filed an Application for Further Review, and the Iowa Supreme Court denied said Application on June 19, 2007. A copy of said order from the Iowa Supreme Court is found in the Appendix at pages 28-29.

JURISDICTION

On March 2, 2006, the Iowa District Court for Woodbury County entered its Order and Judgment, and said opinion is filed herewith in the Appendix at pages 16-27. Spencer Diesel filed a timely notice of appeal, and on April 25, 2007, the Iowa Court of Appeals affirmed the decision of the Iowa District Court, and said opinion is filed herewith in the Appendix at pages 1-15. Spencer Diesel filed an Application for Further Review, and the Iowa Supreme Court denied said Application on June 19, 2007. A copy of said order from the Iowa Supreme Court is found in the Appendix at pages 28-29.

Jurisdiction of the United States Supreme Court is invoked under Title 28, United States Code, Section 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

On May 9, 2003, Spencer Diesel filed a "Notice of Appeal to the District Court in and for Woodbury County" from a condemnation award dated April 23, 2003. Subsequent to the Notice of Appeal, Spencer Diesel filed a "Petition at Law on a Condemnation Appeal and Jury Demand" on June 2, 2003. The Petition alleged that Spencer Diesel was the owner in fee simple of a tract of land located within the city limits of Sioux City, Woodbury County, Iowa, which was being used as a parking lot. On March 7, 2003, an application was made to the Chief Judge of the Third Judicial District of Iowa for the appointment of a Commission to Appraise Damages in order to appropriate and take by condemnation Spencer Diesel's property. On April 23, 2003, the Commission met, appraised the land, and awarded damages to Spencer Diesel in the amount of $202,000. Spencer Diesel's Petition alleged that the value of the property was $600,000, and asked for damages in that amount.

The case was scheduled for a trial on January 31, 2006. On January 26, 2006, the City filed a Motion in Limine which sought to bar Spencer Diesel from introducing evidence regarding the "income approach" to valuation. The District Court sustained the City's motion in limine pertaining to Spencer Diesel's

proposed e idence regarding the income from the parking lot. The case was tried to the Court on February 7-8, 2006. Because the matter was not tried in front of a jury and because a large portion of Spencer Diesel's case was precluded by the District Court's ruling on the motion in limine, a large portion of the transcript is devoted to offers of proof, allowed to be presented for that reason but not considered by the Court in rendering its judgment.

The District Court filed its "Order and Judgment" on March 2, 2006. The Order determined that the fair market value of the property was $202,000, which was the same as the amount found by the condemnation commission. Spencer Diesel filed a timely Notice of Appeal on March 9, 2006. As noted above, the Court of Appeals affirmed the judgment of the District Court, and the Iowa Supreme Court denied Petitioner's Application for Further Review.

Spencer Diesel acquired the property at issue in this case on or about March 14, 1996. After Spencer Diesel acquired the parking lot, Don Mittelstadt of Spencer Diesel found out that there was an old gas station on the property that needed to be cleaned up, and he could do nothing on the property until that occurred. Spencer Diesel started the process of the cleanup, which took several years to accomplish because of the complicated administrative process that needed to be followed. In the meantime, Spencer Diesel was prohibited from doing anything regarding the lot during that period of time.

After the cleanup process was finished, Mittelstadt contacted Bob Houlihan, Spencer Diesel's accountant, regarding what to do with the property. Houlihan served on a public board for the City called "Main Street," which is now referred to as "Downtown Partners." The goal of Main Street was to promote the downtown area of Sioux City. Houlihan informed Mittelstadt that Civic Partners, a development company out of California, was interested in developing the area and wanted to work with him regarding the parking lot. Through Houlihan, Civic Partners told Spencer Diesel that they would be "in the loop" regarding future development. Civic Partners indicated that it was either going to be a parking lot or they were going to change it into a retail center or parking ramp. Spencer Diesel expressed the desire to enter into a long-term lease regarding the property, which was agreed to by Civic Partners because it was at that time Spencer Diesel was told it would be "in the loop."

Before the City informed Spencer Diesel that the parking lot was going to be condemned via eminent domain, the City approached Mittelstadt with a letter informing him that they were interested in purchasing the property. The City indicated that they wished to acquire the property for a downtown development project, which was a $35 million downtown renewal project that included a new multi-theater Cineplex and additional retail next to the Sioux City Convention Center. On May 15, 2002, the City sent a letter to Spencer Diesel which enclosed an appraisal of the

parking lot by Deane Davenport. The appraisal valued the property at $202,000 as of April 9, 2002. Davenport's appraisal noted that the property was approximately 22,500 square feet and that "[r]ecent land sales are limited in the immediate area at this time." The appraisal valued the property by both considering allegedly comparable sales and the "income approach," whereby Davenport valued the property based on its income as a parking lot. Davenport concluded that the property was worth $9 per square foot, which led to a total of $202,500, and he proceeded to round down to reach the figure of $202,000. The value he obtained by the income approach was $182,000. For purposes of valuing the property through the income approach, Davenport assumed the parking lot would only have a 40% occupancy rate (60% vacancy). Several pages of Davenport's appraisal are devoted to the income approach.

On August 5, 2002, Spencer Diesel's attorney sent a letter to the City which indicated that Davenport's appraisal was too low because the parking lot occupancy rate was much higher than the rate Davenport used. Based on research performed on behalf of Spencer Diesel, vacancy rates should have ranged between 10-25%, not the 60% assumed by Davenport. At trial, through an offer of proof, Houlihan testified at length in support of the $600,000 valuation based upon revised occupancy rates. Mittelstadt testified that he was not disregarding the City's appraisals, but was using them and disagreeing with them

regarding the occupancy rates, which as Davenport admitted, involved a simple formula that you can plug a percentage into. Mittlestadt proceeded to explain the occupancy rates that should have been used and how that justified the $600,000 being sought.

On November 21, 2002, the City for the first time indicated that they were going to look at obtaining the property through the power of eminent domain. The City proceeded to condemn the land via eminent domain and put a value on the property of $202,000 as of the date of the condemnation, April 23, 2003.

After the commencement of the litigation, the City proceeded to obtain another appraisal of the parking lot by the Iowa Appraisal and Research Corporation. Their inspection was performed on October 4, 2003, and they delivered the appraisal to the City on October 14, 2003, but the report indicated that the property was valued as of the date of the condemnation, April 23, 2003. The report valued the property at $200,000. The report stated: "Real estate appraisers generally use three approaches to value known as: The Cost Approach, Sales Comparison Approach (also known as the Market Data Approach) and the Income Capitalization Approach." The report admits that income producing properties are generally valued by developing a cash flow analysis. The report then goes on to assume low income rates from the parking lot just as the Davenport report did, thus yielding similar numbers to the Davenport appraisal.

At trial, Mittelstadt affirmed his opinion that the property was worth $600,000. Mittelstadt testified that none of the properties listed by the City's appraisers were "comparable sales" due to their lack of proximity to the widely publicized downtown development project. Davenport confirmed the uniqueness of the property by admitting that none of the other properties were adjacent to the convention center and the cineplex. Only Mittelstadt's lot could be used as parking for the Cineplex. None of the other alleged comparable sales were particularly close to Spencer Diesel's property, and were not even close to the new downtown development.

Spencer Diesel relied on the City's appraisals which utilized the income approach. It was not until shortly before trial that the City redacted the appraisals and took out all references to the income approach being utilized, and the District Court allowed the City to redact the reports so that the only valuation method found therein was the "comparable sales" method – no evidence regarding the "income approach" was allowed by the District Court, and the Iowa appellate courts affirmed this exclusion.

The question of just compensation for the property of Spencer Diesel that was condemned via eminent domain was raised at various points during the proceedings in the state courts. At the trial court level, the Petition alleged that the value of the property was in excess of the $202,000 awarded by the condemnation commission, and the various briefs submitted to the trial court also address this issue.

The specific issue of whether Petitioner was denied just compensation was raised by Petitioner's strenuous objection at trial to the ruling of the trial court that evidence pertaining to the income that would have been generated by the property was inadmissible, and a lengthy offer of proof was made pertaining to valuation of the property based on the income of the property. This issue was raised again in Spencer Diesel's briefs to the Iowa appellate courts, and the specific issue of just compensation pursuant to the Fifth Amendment to the United States Constitution was raised in its opening appellate Brief: "[T]he constitutional issue of whether Spencer Diesel's property was taken without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 18 of the Iowa Constitution is reviewed de novo." (Appellant's Brief, p. 17).

REASONS FOR GRANTING THE WRIT

The decisions of the Iowa courts in this matter denied Spencer Diesel "just compensation" pursuant to the Fifth Amendment. Spencer Diesel owned a parking lot in a unique location at a unique time – it was a lot next to a substantial urban redevelopment project in downtown Sioux City, Iowa. The use of the property as a parking lot was the highest and best use for the property, as it would have had high occupancy rates. The comparable sales approach of evaluation utilized by the Iowa courts does not take

into consideration the uniqueness of this property, nor does it take into consideration the income that the property would have generated. As noted above, the Iowa courts completely barred any evidence relating to income that would have been generated by the property in question, and the result was a denial of just compensation for Spen(:r Diesel's property. Spencer Diesel's evidence showed that the property had a value of $600,000 based on the income that would have been generated by the parking lot, and the award was approximately ⅓ of that amount due to the complete refusal of the lower courts to consider the income that would have been generated by the property.

The just compensation clause of the Fifth Amendment requires that the owner of condemned property must be put "in as good a position pecuniarily as if his property had not been taken." *United States v. 564.54 Acres of Land,* 441 U.S. 506, 510, 99 S.Ct. 1854, 1857, 60 L.Ed.2d 435 (1979) (*quoting Olson v. United States*, 292 U.S. 246, 255 (1934)). The Court proceeded to note:

> Although the market-value standard is a useful and generally sufficient tool for ascertaining the compensation required to make the owner whole, the Court has acknowledged that such an award does not necessarily compensate for all value an owner may derive from his property. Thus, we have held that fair market value does not include the special value of property to the owner arising from its adaptability to his particular use.

564.54 Acres of Land, 441 U.S. at 511. When the market value is difficult to ascertain, or "when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards." *Id.*, 441 U.S. at 512 (*quoting United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)). In the present case, market value was difficult to ascertain due to the lack of comparable sales, and there was manifest injustice to Spencer Diesel due to the complete failure of the Iowa courts to consider the income that would have been generated by the property.

This Court has noted that the earnings from property should be considered when deciding the amount of just compensation. In *564.54 Acres of Land*, it was noted that "the uses to which commercial property is put can often be valued in terms of the capitalized earnings produced." *Id.*, 441 U.S. at 515 (citations omitted). It has also been stated: "The rule is well settled that, in condemnation cases, the most profitable use to which the land can probably be put in the reasonably near future may be shown and considered as bearing upon the market value. . . ." *McCandless v. United States*, 298 U.S. 342, 345, 56 S.Ct. 764, 80 L.Ed.2d 1205 (1936) (*citing Olson, supra,* 292 U.S. at 256).

In *Monongahela Navigation Company v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893), this Court stated: "How shall just compensation for this lock and dam be determined? What does the full equivalent therefore demand? The value of

the property, generally speaking, is determined by its productiveness – the profits which its use brings to the owner." *Id.*, 148 U.S. at 328. Later on in *Monangahela Navigation Company*, the Court favorably quoted the case of *Montgomery County v. Bridge Company*, 110 Penn. St. 54, 58, 20 A. 407 (Pa. 1885) which involved the condemnation of a privately owned bridge:

> The bridge structure, the stone, iron and wood, was but a portion of the property owned by the bridge company, and taken by the county. There were the franchises of the company, including the right to take toll, and these were effectively taken as was the bridge itself. Hence, to measure the damages by the mere cost of building the bridge would be to deprive the company of any compensation for the destruction of its franchises. The latter can no more be taken without compensation than can its tangible corporeal property. Their value necessarily depends upon their productiveness. If they yield no money in return over expenditures, they would possess little, if any, present value. If, however, they yield a revenue over and above expenses, they possess a present value, the amount of which depends, in a measure, upon the excess of revenue. Hence it is manifest that the income from the bridge was a necessary and proper subject of inquiry before the jury.

Id., 148 U.S. at 329.

The Iowa courts have developed a line of case law precedent which holds that lost revenues are not allowed in eminent domain cases because "profits of a business are too uncertain, and depend on too many contingencies to safely be accepted as any evidence of the usable value of the property upon which the business is carried on." *Comstock v. Iowa State Highway Commission*, 254 Iowa 1301, 121 N.W.2d 205, 210 (1963) (citation omitted). While there is some logic to this statement from *Comstock*, there is absolutely no justification for the application of this principle across the board to virtually all cases, as they have done in the present case. Mittelstadt testified as to the expected occupancy rate of the parking lot, and Spencer Diesel's accountant testified as to the expected revenue of the lot. The income from a parking lot is not speculative compared to other business ventures such as restaurants. Little or no management skill is required – the owner simply has to maintain the lot and charge an appropriate fee relative to the market. The decisions of the Iowa courts to completely disregard testimony regarding the expected income of the property is not consistent with this Court's prior opinions set forth above, and violates the spirit of the just compensation clause of the Fifth Amendment.

CONCLUSION

For the reasons set forth above, Spencer Diesel submits that this Court should grant its Petition for Writ of Certiorari so that its right to just compensation for property taken for public use, under the Fifth Amendment to the United States Constitution, can be upheld.

Respectfully submitted this 17th day of September, 2007.

MUNGER, REINSCHMIDT & DENNE, L.L.P.

STANLEY E. MUNGER, *Counsel of Record*
600 Fourth Street
303 Terra Centre
P.O. Box 912
Sioux City, IA 51102
(712) 233-3635
(712) 233-3649 (fax)

Attorneys for Petitioner

IN THE COURT OF APPEALS OF IOWA

No. 7-069 / 06-0494
Filed April 25, 2007

SPENCER DIESEL INJECTION & TURBO, INC.,
Plaintiff-Appellant,

vs.

THE CITY OF SIOUX CITY, Iowa, A Municipal Corporation, et al.,
Defendants-Appellees.

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

Property owner appeals from a district court ruling in an eminent domain appeal ascertaining the amount of damages for the condemnation of its fee interest in real estate. **AFFIRMED.**

Stanley E. Munger and Jay E. Denne of Munger, Reinschmidt & Denne, L.L.P., Sioux City, for appellant.

Connie E. Anstey, Assistant City Attorney, Sioux City, for appellee.

Heard by Sackett, C.J., and Mahan and Miller, JJ.

MILLER, J.

Property owner Spencer Diesel Injection & Turbo, Inc. (Spencer Diesel) appeals from a district court ruling in an eminent domain appeal ascertaining the

amount of damages for condemnation of its fee interest in real estate at $202,000. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

On March 14, 1996, Spencer Diesel purchased an approximately 22,500 square foot piece of property located at 807 Third Street in Sioux City, Iowa for $136,000. Don Mittelstadt, president of Spencer Diesel, acquired the property through a defaulted loan. The property was used as a surface parking lot by the former owner. The lot was paved with asphalt, which was in poor condition. Soon after gaining possession, Mittelstadt learned there was an old gas station on the lot that required environmental cleanup. He could not use the property until the environmental cleanup process was finished in 1998. After the cleanup was completed, Mittelstadt discovered Civic Partners, a development company in California, was interested in developing the surrounding area. He held the property in hope of leasing it on a long-term basis to Civic Partners. However, he never entered into a lease agreement with Civic Partners.

The City of Sioux City informed Mittelstadt in March 2002 it was interested in acquiring the property for use as a parking lot in connection with the Downtown Development Project, a thirty-five million dollar well-publicized downtown renewal venture. Deane Davenport performed an appraisal of the

property on behalf of the city. Davenport valued the property at $202,000 as of April 9, 2002 pursuant to a comparable sales or market data approach. He also analyzed the value of the property according an income capitalization approach, which resulted in a value of $182,000. Davenport placed the greatest weight on the comparable sales method. Upon receipt of Davenport's appraisal, Mittelstadt offered the city a two year lease at $3,500 per month with an option to buy at the end of the lease for $600,000. The City did not accept Mittelstadt's offer and instead initiated condemnation proceedings.

On April 23, 2003, the condemnation commission met to view the condemned property and appraise the damages sustained by reason of the condemnation. After hearing testimony from Davenport and considering his appraisal report, the commission determined Spencer Diesel would sustain damages of $202,000. Spencer Diesel did not appear at the condemnation hearing.

Spencer Diesel filed an appeal with the district court. The city obtained a second appraisal of the parking lot prior to trial on the appeal. The second appraisal was performed by Michael Plummer. Like Davenport, Plummer also used both a comparable sales and income approach in his analysis of the property. He determined total consideration should be given to the comparable sales approach, which resulted in a value of $200,000 as of April 23, 2003. Spencer Diesel did not retain an appraiser, nor did the company designate an expert witness to testify at

trial regarding the value of the property. Prior to trial, the city filed a motion in limine, seeking in part to prohibit Spencer Diesel from introducing any evidence of the value of the property based upon an income capitalization method. The district court determined that the business value evidence should not be presented. The city redacted all references to the income capitalization value from the appraisals completed by Davenport and Plummer. Spencer Diesel requested a continuance in order to obtain an appraisal and designate an expert witness to testify as to the value of the property. The district court denied that request. The parties waived a jury, and the matter proceeded to trial before the court.

At trial, Davenport and Plummer's redacted appraisal reports were admitted into evidence. Davenport and Fred Lock, Plummer's supervisor, testified on behalf of the city regarding the findings of the appraisals.[1] Both Davenport and Lock stated they were able to determine the value of the property through the comparable sales method. Davenport testified the fair market value of the property was $202,000, while Lock testified the value of the property was $200,000. In an offer of proof, Mittelstadt testified on behalf of Spencer Diesel that he believed the property was worth $600,000. In another offer of proof, Spencer Diesel's accountant, Bob Houlihan, testified as to his valuation of the property using an

[1] Michael Plummer was unable to testify at trial due to a serious medical condition.

income approach. Houlihan's testimony relied on redacted portions of Davenport's appraisal. He substituted different rental and occupancy rates to arrive at values ranging between $450,000 and $589,000 for the property.

The district court determined the fair market value for the property was $202,000, the same value fixed by the condemnation commission. The court relied on the appraisal reports completed by Davenport and Plummer and the testimony presented by the city in support of those reports. The court noted that Spencer Diesel failed to present credible evidence it was entitled to more than $202,000 as fair and just compensation for the taking of the property.

Spencer Diesel appeals the district court ruling. It contends the district court erred in 1) barring all evidence of the income approach to the valuation of Spencer Diesel's property, 2) assessing the fair market value of Spencer Diesel's property at $202,000, and 3) denying Spencer Diesel's request for a continuance.

II. SCOPE AND STANDARDS OF REVIEW.

The district court is given appellate jurisdiction over awards of the compensation commission. Iowa Code § 6B.18; *Chao v. City of Waterloo,* 346 N.W.2d 822, 824 (Iowa 1984). The case is tried to the district court as an ordinary proceeding. Iowa Code § 6B.21. We review ordinary proceedings for the correction of errors at law. Iowa R.App. P. 6.4; *Sunrise Developing*

Co. v. Iowa Dep't of Transp., 511 N.W.2d 641, 643 (Iowa Ct. App. 1993).[2] The sole issue for the district court's determination is the amount of damages caused by the taking. Iowa Code § 6B.23; *Iowa State Highway Comm'n v. Read*, 228 N.W.2d 199, 202 (Iowa 1975). The factual findings of the district court are binding on us if supported by substantial evidence. Iowa R.App. P. 6.14(6)(*a*). The amount of condemnation damages is peculiarly within the province of the trier of fact. *Sunrise Developing Co.*, 511 N.W.2d at 645. Thus, appellate courts have consistently refused to interfere with the amount absent a showing it was wholly unfair or unreasonable. *Id.*

The district court's evidentiary rulings are reviewed for an abuse of discretion. *Kurth v. Iowa Dep't of Transp.*, 628 N.W.2d 1, 5 (Iowa 2001). The court's determination of whether to grant a motion to continue is also reviewed for an abuse of discretion. *In re Estate of Lovell*, 344 N.W.2d 576, 578 (Iowa Ct. App. 1983). An abuse of discretion occurs when the trial court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable. *Kurth*, 628 N.W.2d at 5 (citations omitted).

---

[2] Spencer Diesel contends we must conduct a de novo review of the district court proceedings because their right to just compensation is constitutionally protected. Although Spencer Diesel's underlying right to just compensation is constitutional in nature, our review of this type of case for errors at law is well established.

III. MERITS.

Both the Iowa and United States Constitutions prohibit the taking of private property without just compensation. U.S. Const. amend. V; Iowa Const. art. I, § 18; *Aladdin, Inc. v. Black Hawk County,* 562 N.W.2d 608, 611 (Iowa 1997). "In determining what constitutes 'just compensation,' courts must look to the individual facts of each case." *Sunrise Developing Co.,* 511 N.W.2d at 643 (quoting *CMC Real Estate Corp. v. Iowa Dep't of Transp.,* 475 N.W.2d 166, 170 (Iowa 1991)). The general rule states:

> A court may consider all factors indicative of the value of the property, and which would have been present in the minds of a willing buyer and a willing seller, unless the considerations advanced are too speculative or remote, and thus not a necessary, natural, or proximate result of the taking.

Kurth, 628 N.W.2d at 6 (citation omitted). "'When the entire property is taken . . . the measure of damage is the reasonable market value at the time of condemnation. . . .'" *Id.* (quoting *Aladdin,* 562 N.W.2d at 611-12). In such cases, "the usual guide to the fair market value of the property is comparable sales figures." *Id.* at 7.

Where condemnation of a fee interest is sought, evidence of business profits is generally inadmissible as an independent element of damage or as relevant in determining the value of the land because it is too uncertain and depends upon too many contingencies.

Id. The only exceptions to the rule prohibiting valuation by the business profits or income capitalization approach are when the property taken is a leasehold or land used for agricultural purposes. *Id.* at 7 (citations omitted). Resort to other methods of valuation may also be had where there are no comparables, no market, and no general buying and selling of the kind of property in question. *Sunrise Developing Co.*, 511 N.W.2d at 643 (citing *Comstock v. Iowa State Highway Comm'n*, 254 Iowa 1301, 1309, 121 N.W.2d 205, 210 (1963)).

A. Business Value Testimony.

Spencer Diesel's first assignment of error is that the district court erred in excluding evidence of the value of the property based upon an income capitalization approach. It argues: (1) there were no comparable sales, (2) an exception to the general rule prohibiting evidence of the business value of the property applies, and (3) the city was judicially estopped from arguing against the income approach. We will address each argument in turn.

Spencer Diesel asserts there are no comparable sales because the property was singularly situated in the heart of the city's Downtown Development Project. We disagree. The appraisers were able to determine fair and reasonable market value based upon the comparable sales or market data approach. In fact, both Davenport and Plummer placed the great-

est weight on the comparable sales method in valuing the property.

The comparable sales identified by the appraisers included other properties being used as parking lots in the same area as the subject property. According to Spencer Diesel, the comparable sales identified by the appraisers were not similar to its property given the city's development project and the property's location in relation to that project. The district court correctly noted that "comparable" in the context of property valuation does not mean identical. *See, e.g., Sears, Roebuck & Co. v. Sieren,* 460 N.W.2d 887, 890 (Iowa Ct. App. 1990) (finding large anchor store space and small retail shop spaces to be comparable properties).[3] Moreover, "the value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to or because of the taking." *Olson v. United States,* 292 U.S. 246, 255, 54 S.Ct. 704, 708-09, 78 L.Ed. 1236, 1244 (1934).

Spencer Diesel next argues we should adopt the approach utilized by the courts in *Standard Oil Co. v. Commonwealth of Kentucky,* 414 S.W.2d 570 (Kent. Ct. App. 1966) and *Private Property for Municipal Court Facility v. Kordes,* 431 S.W.2d 124 (Mo. 1968) and create a new exception to the comparable sales

[3] Although *Sears* involved a tax assessment dispute, we believe its reasoning regarding the valuation of property is equally applicable in a condemnation action.

rule for parking lots. We reject this argument and find those cases do not apply to the situation presented herein. The property owners in both cases were able to produce evidence of clear and permanent profits from a business operation on the property. *Standard Oil,* 414 S.W.2d at 571; *Kordes,* 431 S.W.2d at 126. There was no such evidence presented in this case because Spencer Diesel did not operate a business on the property. The figures used by Spencer Diesel's accountant in valuing the property according to the income approach were uncertain and speculative due to the lack of any income history. *See Comstock,* 254 Iowa at 1308, 121 N.W.2d at 209 (determining that "[a]nticipated profit has too many variables . . . to be the sole basis for fixing value."). Furthermore, in *Standard Oil,* the court allowed use of a recognized gasoline industry formula in valuing the property. *Standard Oil,* 414 S.W.2d at 572. There is no accepted parking lot industry formula upon which Spencer Diesel could rely. Finally, *Kordes* does not treat a surface parking lot as a species of unique property nor does it sanction evidence of business profits as a per se rule of proof of value when such land is taken. *Land Clearance for Redevelopment Auth. of Kansas City v. Coen,* 773 S.W.2d 465, 468 (Mo. App. 1989).

Spencer Diesel argues in the alternative that evidence of business profits should have been admitted pursuant to the recognized leasehold exception. We determine this exception does not apply because there was no evidence of a valid lease. The only

evidence Spencer Diesel presented regarding a supposed lease was Mittelstadt's testimony that he had an oral contract with Civic Partners to enter into a lease agreement for the parking lot. However, the city established through its cross-examination of Mittelstadt and Spencer Diesel's accountant, Houlihan, that no such lease agreement was ever entered into.

Spencer Diesel's final argument regarding its first assignment of error is that the city was judicially estopped from arguing against the income capitalization approach because the city relied on such an approach in the condemnation proceeding. The doctrine of judicial estoppel "prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding." *Winnebago Industries, Inc. v. Haverly,* 727 N.W.2d 567, 573 (Iowa 2006) (citations omitted). The doctrine is applicable in administrative, as well as judicial, cases. *Id.* A "fundamental feature" of the doctrine is "proof that the inconsistent position has been successfully asserted in the prior tribunal. . . . Without such proof, 'application of the rule is unwarranted because no risk of inconsistent, misleading results exists.'" *Id.* (quoting *Wilson v. Liberty Mut. Group,* 666 N.W.2d 163, 166 (Iowa 2003) (other citations omitted). Spencer Diesel did not appear at the condemnation hearing. More importantly, the damages awarded by the commission were equal to Davenport's valuation of the property using the comparable sales approach. Therefore, judicial estoppel does not apply because Spencer

Diesel failed to present proof that the city successfully relied on the income approach in the condemnation proceedings.

In conclusion, we find the district court did not abuse its discretion in excluding evidence of the valuation of the property using an income approach. Two appraisers testified there were comparable sales available. None of the exceptions to the general rule prohibiting valuation by the business profits or income capitalization approach applied. The city was not judicially estopped from seeking to exclude evidence of the income capitalization method. Having determined the district court did not abuse its discretion in excluding evidence of the business value of the property, we now must decide whether there is substantial evidence supporting the award of $202,000 as compensation for the taking of the property.

B. Fair Market Value of the Condemned Property.

Spencer Diesel claims the district court erred in finding that the value of the property was $202,000. The district court's determination that there were comparable sales available is supported by substantial evidence. The city presented two expert opinions and appraisal reports as to the fair market value of the property at the time of the condemnation. Davenport's appraisal of the property using the comparable sales method valued the property at $202,000 as of April 9, 2002. Plummer appraised the property at

$200,000 as of April 23, 2003 pursuant to the comparable sales method.

Spencer Diesel did not retain an appraiser, nor did the company designate an expert witness to testify at trial regarding the value of the property. Mittelstadt testified that he believed the property was worth $600,000. However, this estimate is not supported by any other evidence admitted at trial. Spencer Diesel contends the property should have been valued at a minimum of $13.42 per square foot, which was the sale price of property located at 1214 Fourth Street and identified by both of the city's appraisers as a comparable sale. The district court rejected this argument because Spencer Diesel failed to offer any credible evidence suggesting that more weight should be given to the sale at 1214 Fourth Street than the other comparable sales relied on by the city's experts.

The heart of most property valuation cases is the evidence of experts regarding their professional judgments as to the fair market value of the subject property. *Sears, Roebuck & Co. v. Siereni* 484 N.W.2d 616, 617 (Iowa Ct. App. 1992); *see also Kurth,* 628 N.W.2d at 4; *Sunrise Developing,* 511 N.W.2d at 643. The district court's conclusion regarding the fair market value of the property is supported by substantial evidence presented by the city. We accordingly conclude Spencer Diesel has failed to show the ascertainment of damages in this case was wholly unfair and unreasonable. *Sunrise Developing Co.,* 511 N.W.2d at 645.

C. Motion to Continue.

Spencer Diesel argues the district court erred in denying its request for a continuance. A continuance "may be allowed for any cause not growing out of the fault or negligence of the movant, which satisfies the court that substantial justice will be more nearly obtained." Iowa R. Civ. P. 1.911(1). Trial courts have broad discretion in determining whether to grant motions for continuances. *Hawkeye Bank & Trust Co. v. Michel,* 373 N.W.2d 127, 129 (Iowa 1985). As stated previously, we review a court's decision to grant or deny a continuance for abuse of discretion. *Lovell,* 344 N.W.2d at 578. To prove the court abused its discretion in denying the motion to continue, Spencer Diesel must show the court exercised its discretion for clearly unreasonable or untenable reasons. *In re Estate of Olson,* 479 N.W.2d 610, 613 (Iowa Ct. App. 1991).

Following the district court's ruling on the city's motion in limine, Spencer Diesel requested a six-month continuance so it could obtain an appraisal and expert witness. Spencer Diesel's motion to continue was made less than one week before trial. The trial had been scheduled for approximately six months. Spencer Diesel's counsel was involved with the case for more than a year prior to trial. The case had been pending for about two and a half years at the time the request to continue was made. Under the circumstances, we cannot find the district court abused its discretion in denying Spencer Diesel's request for a continuance.

IV. CONCLUSION.

We conclude the district court did not abuse its discretion in prohibiting evidence of the income capitalization approach or business profits when determining the value of the condemned property. We further conclude the district court's ruling ascertaining the damages for condemnation of Spencer Diesel's property at $202,000, the same amount assessed by the condemnation commission, is supported by substantial evidence. Finally, we conclude the district court did not abuse its discretion in denying the motion to continue.

AFFIRMED.

IN THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY

SPENCER DIESEL INJECTION & TURBO, INC., Plaintiff, vs. THE CITY OF SIOUX CITY, A Municipal Corporation, ET AL., Defendant.	Law NO. CVCV127068 ORDER AND JUDGMENT

(Filed Mar. 2, 2006)

Now on this 7th day of February, 2006, comes on for trial and hearing the above-captioned matter. Attorney Stanley Munger appeared for the plaintiff, and Attorney Connie Anstey appeared for the defendant. Although a jury was initially requested, after the pretrial rulings of this court, the parties waived a jury trial in writing on February 6, 2006.[1] The

[1] The background facts and pretrial rulings of this court began with the undersigned being given this file on the Thursday before the initial trial date (January 31). Upon review of the file it was noted that pretrial briefs and motions were not due until Thursday, January 26, and this court was committed to other hearings on Friday, January 27. Hence, the pretrial conference and hearing on the pretrial motions was scheduled for Monday, January 30 (the day before trial). Also scheduled at that time were motions to quash filed by witnesses subpoenaed to testify for the plaintiff. A review of the file revealed that no experts had been designated by the plaintiff's deadline of September 30, 2005, and after the hearing on the defendant's

(Continued on following page)

motion in limine, this court found that there were sales of comparable property; and, accordingly, pursuant to *Sunrise Developing Company v. Iowa DOT*, 511 N.W.2d 641 (Iowa App. 1993), determined that value would be established through market sales comparison approach only; and, more specifically, that the income capitalization evidence, held inadmissible in *Kurth v. The Iowa Department of Transportation*, 628 N.W. 2d 1 (Iowa 2001), would not be admitted, especially in light of the fact that there were no income figures from the subject property upon which to base an evaluation. Hence, the plaintiffs' proposed evidence based on an income capitalization approach using rental rates and occupancy rates from other parking lots would be held inadmissible. The court also continued the trial from the next day and invited counsel to submit a new trial date and other matters by February 1, 2006. On February 3 the new filings were heard, and the court overruled the defendant's motion for summary judgment and scheduled the trial to start the following Tuesday, February 7, at 9:30 a.m. The court denied the plaintiff's motion for a six-month continuance and request contained therein to reopen the time for it to obtain an expert. The parties waived their right to a jury trial at the final pretrial conference held on February 6. The court further directed plaintiff's counsel to place their income capitalization evidence and related exhibits and/or records in an offer of proof. Such evidence using various hypothetical rental rates and occupancy rates generated a stream of income capitalized at a rate of 6.7 percent suggested the property had a value of up to $600,000. These calculations were performed by the plaintiff's CPA, Robert Houlihan, and are shown in a number of exhibits admitted in the plaintiff's offer of proof. In light of pretrial rulings, the court expected the plaintiff would attempt to show in its case-in-chief and in cross-examination of the city's experts that the subject property was comparable to the sale of 1214-26 Fourth Street at a price of $13.46 per square foot or, perhaps, even higher, which would increase the subject property's valuation by 50 percent or $100,000. However, the plaintiff elected to continue with its theory that there were no sales of comparable property near April 23, 2003, and that this court's pretrial

(Continued on following page)

proceeding was stenographically reported by the court's official reporter. The court, having heard the testimony, examined the exhibits and considered the applicable principles of law proceeds to rule as follows:

FINDINGS OF FACTS

1. The property taken in this condemnation proceeding is described as "All of Lots 10, 11 and 12 in Block 22, Middle Sioux City, in the County of Woodbury and State of Iowa." The subject property is located at the northeast corner of Third and Jones Street and has an address of 807 Third Street. It contains 22,500 square feet.

2. The date of condemnation was April 23, 2003, and the commission set the value of the property on that date and made an award of $202,000 to the property owner, Plaintiff Spencer Diesel Injection & Turbo, Inc., of Spencer, Iowa. ($9 per square foot x 22,500 square feet = $202,500 rounded to $202,000.)

3. Prior to April 23, 2003, the property was being held for speculation and being used as a parking lot. It had few improvements.

4. The American Institute of Architects and their urban planning and design committee did a study of Sioux City in 1996 and 1997 (Exhibit 4) and

---

rulings and evidentiary rulings were in error and that the matter would be resolved on appeal.

identified the subject lot as being in the area of proposed development, some of which had occurred and some of which had not occurred as of April 23, 2003. (See Exhibits 5 and 6).

5. Don Mittelstadt, part owner of Spencer Diesel, acquired the property by virtue of it being collateral for a loan subsequently defaulted upon. Some environmental cleanup was required as the property once contained a gas station. Mr. Mittelstadt was hopeful of leasing the property on a long-term basis to Civic Partners, developers of the theater complex expected to be built a block east of the subject property. He listed his cost of the property at $136,000. Mr. Mittelstadt's valuation of $600,000 was based upon hypothetical rates of occupancy and rental rates of other parking lots and a capitalization rate of 6.7 percent. Mr. Mittelstadt, however, had no income stream from the subject property upon which to base a capitalization approach. He had no leases for the property nor were any offers to lease contained in his offer of proof. Mr. Mittelstadt denied any attempts by the appraisers to contact him, stating that he did not have e-mail, however, Exhibit 8 was an e-mail to him from his prior attorney.

Although the city moved for directed verdict at the close of the plaintiffs case on the grounds set out in its motion for summary judgment, this court overruled it believing that the record should be fully developed for appellate purposes in the event this court's pretrial and evidentiary rulings were in error.

6. The defendants' first witness, Deane Davenport, MAI-CCIM-SR/WA-SRA, has resided in and was a real estate broker and appraiser in Sioux City, Iowa, for a period of time, having also operated his real estate appraisal business in Arkansas and, most recently, in Colorado. His appraisal (Exhibit 102), as well as his oral testimony, indicates there are sufficient sales of comparable property upon which to base his valuation. He went on to testify that comparable sales represent what real buyers and real sellers have done, and it demonstrates what similar property has sold for. Minor adjustments are made for location visibility, size of property, timing of sale, etc. He went on to explain that investment value is the value of a particular piece of property to a particular person and is often used synonymously with speculative value. Market value is the value to the public generally. Mr. Davenport then proceeded to talk about each of the comparable sales listed in his appraisal, explaining the adjustment made to each of them and concluding that his market sales comparison valuation of the subject property was $202,000. He further determined that the comparable or market sales approach was the best approach to use to value this property. Mr. Davenport acknowledged that in the past his work for the city of Sioux City constituted from 20 to 35 percent of his business. He has appraised all sorts of property in this community, both residential and commercial. He has no other pending business for the city at this time and is being paid for his time. He further advised that he was aware of the development going on in the area in April 2003 and that

agreements had been entered into with various developers that were contingent upon the coming about of certain events or parameters and that his historical experience indicates that in Sioux City a lot of these parameters or events never come to fruition. Mr. Davenport discounted comparable no. 3, the sale of property at the east end of Fourth Street, for the reason that it was a tax-free exchange and that the purchaser indicated to him he believed he paid too much for the property. Another comparable exactly the same size was located approximately three blocks west of the subject property, also on Third Street, located at the northeast corner of Third and Pierce Street.

7. Prior to the commencement of the trial, the defendant moved to substitute the expert witness Fred Lock for Michael Plummer. Michael Plummer was employed by Iowa Appraisal and Research Corporation and did the appraisal, Exhibit 104, received into evidence; and Mr. Lock is the president of Iowa Appraisal and Research Corporation. Mr. Plummer has developed a serious medical condition prohibiting him from being able to testify in the foreseeable future. Accordingly, Mr. Lock, although having driven by the subject property and each of the comparable properties, testified largely from the appraisal done by his employee and colleague, Mr. Plummer. It was also their opinion that there were sufficient sales of comparable property to make their appraisal on the market sales approach and eight comparable sales were developed. The closest property geographically

is located approximately one block east of the subject property on the south side of Third Street and was known as 930 Third Street. The comparable at 930 Third Street, located across the street from the theater development was sold on May 29, 2002, for $7.91 per square foot for 37,920 square feet. This property was cut in half and the south half has been listed for sale at $11.86 per square foot and has still not sold as of the trial date. Just as Mr. Davenport was aware of the development in the area when doing his appraisal, p. 9, of the Plummer appraisal (Exhibit 104) recognizes the development in the area and revamping of Historic Fourth Street into Sioux City's primary restaurant and entertainment area. The Plummer-Lock appraisal places the subject property's value at $200,000.

Other witnesses for the defendant, Ms. Reynolds and Mr. Gann testified that the purpose of the condemnation of the subject property was to replace parking lost by opening Fourth Street through what used to be a substantially large parking lot to the south and west of the convention center.

CONCLUSIONS OF LAW

Rule 1.904 provides in part as follows:

> (1) The court trying an issue of fact without a jury, whether by equitable or ordinary proceedings, shall find the facts in writing separately stating its conclusions of law and direct an appropriate judgment.

The applicable law for eminent domain cases is largely contained in Chapter 2500 of the Uniform Jury Instructions. Instruction 2500.2 provides in part that private property shall not be taken for public use without just and fair compensation to its owner. Therefore, the only issue for the fact finder to decide is the amount of damages the owner has suffered as a result of the taking. "Just compensation" is defined as the payment of money to the owner of the condemned property that fully makes up for their loss. Whether or not the owner of the property wants to part with their property has no bearing on the fair and reasonable market value of the property nor should it have a bearing on the amount of compensation paid.

Instruction 2500.3 states that it is the *owner's burden of proof* to show the fair and just compensation to which he is entitled. "Fair and just compensation" is the reasonable market value of the property as a whole immediately before the taking which occurred herein on April 23, 2003. In the making of this decision, the fact finder must disregard benefits to the owner's property which may have resulted or may result in the future from any improvements.

Instruction 2500.4 states that the term "fair and reasonable market value" means the cash sales price between a voluntary, willing seller who is not forced to sell and a voluntary, willing buyer who is not forced to buy. It assumes the buyer and seller are bargaining freely in the open market for the purchase and sale of real estate and goes on to say that "The term does not mean a value under circumstances

where greater than its fair price would be obtained, nor does it mean the price which the property would bring at forced sale. *Also, it does not mean what the property is worth to the owner. . . .* "

Instruction 2500.6 lists the valuation factors that a fact finder may consider in determining the fair and reasonable market value of the property supported by the evidence. Factor no. 5 is comparable sales of other property. Uniform Jury Instruction 2500.7 defines comparables and points out that "comparable" or "similar" does not mean identical.

DECISION

As stated in Footnote 1, the court's first examination of this file prior to trial revealed that the plaintiff listed no experts or appraisers that he intended to call as witnesses. At the outset of the trial, the court was also aware of the language on p. 8 of the *Kurth v. The Iowa Department of Transportation*, 628 N.W.2d 1 (Iowa 2001),case in which it is stated that "The condemnation verdict or award cannot be higher than the highest estimate of the expert witnesses nor lower than the lowest," and that both such estimates would be given by the city's experts. This court, however, is also aware of U.J.I. 2500.6, U.J.I. 100.9 and U.J.I. 100.12 and believed that if Mr. Mittelstadt and/or other witnesses could point out under those valuation factors credible and reasonable arguments and contentions why the appraised valuation should be higher in view of the comparables, this court was

prepared to do so. As earlier indicated, the court fully expected to hear arguments and contentions why the subject property was comparable to that at 1214 Fourth Street and should be valued at least as high as that valuation if not higher ($13.46 per square feet). However, the plaintiff merely attempted to discredit the downward adjustment made by Mr. Davenport and Mr. Plummer as the subject property is compared to that at 1214 East Fourth Street. Plaintiff continued to argue and does so in his post-trial brief that this is not a comparable property. Plaintiff's argument that the downward adjustment should not have been made because it was a Section 1041 sale which had to be accomplished in a limited amount of time and, therefore, should have a tendency to make the property sell for less has some initial appeal. However, in the world of sales, advising the buyer that he has a limited time to buy a commodity for which there is no unending supply and only individual parcels come on the market at various times, may often cause the sales price of a single parcel to rise. This concept was developed by comments from the buyer on the high price he paid for the property at 1214 Fourth Street. Mr. Book was not called by the plaintiff to testify about this transaction. No other property owners in the area were called to offer evidence about a shortage of parking for their businesses or to testify about an increase in rental rates, which would reflect an increase in property values. Additionally, no property owners or business owners were called to testify about the general business health of the area at the time and/or

whether their businesses were growing static or declining. In absence of this kind of testimony and in absence of another appraiser's opinion suggesting a higher value, a reasonable person could conclude that no evidence was found to suggest that the market value of the property was greater than Witnesses Davenport and Lock (Plummer) had placed on it in April 2003. See U.J.I. 2500.6(11). Finally, no questions were asked of Dennis Gann about bookings at the convention center at that time. Were they on the increase at that time or in a decline? Decisions of a fact finder can be based on the evidence or lack of evidence. The law requires that fair market value be based on sales of comparable property, if available, and not on income projections or headlines released by government planners.

There being no credible evidence offered by the plaintiff under the factors set out in U.J.I. 2500.6 upon which this court could conclude that more weight should be given to the sale at 1214 Fourth Street and that the subject property had a value more in line with that property than any of the other comparables offered by the defendant's experts, this court can find no reason to increase the award previously found by the commission and, therefore, determines the fair market value of the subject property to be $202,000.

IT IS SO ORDERED. Costs taxed to the plaintiff.

Dated this 2nd day of March, 2006.

/s/ Gary E. Wenell
GARY E. WENELL
Judge of the Third Judicial District of Iowa

IN THE SUPREME COURT OF IOWA

No. 06-494

Woodbury County No. CVCV127068

ORDER

SPENCER DIESEL INJECTION & TURBO, INC.,
Plaintiff-Appellant,

vs.

THE CITY OF SIOUX CITY, IOWA, A Municipal Corporation, et al.,
Defendants-Appellees.

(Filed Jun. 19, 2007)

After consideration by this court, further review of the above captioned case is denied.

Dated this 19th day of June, 2007.

THE SUPREME COURT OF IOWA

By /s/ Marsha K. Ternus
Marsha K. Ternus, Chief Justice

Copies to:

Stanley E. Munger
Jay E. Denne
Terra Centre, Suite 303
600 Fourth St.
P.O. Box 912
Sioux City, IA 51102-1747

Connie E. Anstey
405 Sixth St., Suite 511
P.O. Box 447
Sioux City, IA 51102

70

No. 07-376

FILED
OCT 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

SPENCER DIESEL INJECTION & TURBO, INC.,

Petitioner,

vs.

THE CITY OF SIOUX CITY, IOWA,
a Municipal Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Iowa

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

IVAN T. WEBBER
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, IA 50309-2231
Telephone: (515) 243-7611
Facsimile: (515) 243-2149
Attorney for Respondent
The City of Sioux City, Iowa

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

1. The present question was not presented to any Iowa Court and has not been preserved for appeal 1

2. The decisions of the Iowa Appellate Courts are not inconsistent with prior rulings of this Court 8

CONCLUSION 12

TABLE OF CONTENTS

Page

CASES:

In Re Condemnation of Certain Rights, 666 N.W.2d 137 (Iowa 2003) 6

Kurth v. Iowa Department of Transportation, 628 N.W.2d 1 (Iowa 2001) 9

Mann v. City of Marshalltown, 265 N.W.2d 307 (Iowa 1978) 6

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 117 S.Ct. 1659 (1997) 8, 9

United States v. Merz, 376 U.S. 973, 84 S.Ct. 1131 (1964) 9

STATUTES AND RULES:

Iowa Code §6B.22 (2001) 6

Iowa Code §6B.23 (2001) 6, 7

Iowa Code §6B.3A (2007) 6

Iowa Rule 6.14(1)(f) 6

U.S. Sup. Ct. Rule 14.1g(i) 1, 3

U.S. Sup. Ct. Rule 15(2) 2

ARGUMENT

1. The present question was not presented to any Iowa Court and has not been preserved for appeal.

The rules of this Court require that in its Petition for Writ of Certiorari a petitioner must set out inter alia:

> When the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Rule 14.1g(i).

In apparent compliance with this rule Spencer Diesel states in its Petition:

> The specific issue of whether Petitioner was denied just compensation was raised by Petitioner's strenuous objection at trial to the ruling of the trial court that evidence pertaining to the income that would have been generated by the property was inadmissible, and a lengthy offer of proof was made pertaining to

> valuation of the property based on the income of the property. This issue was raised again in Spencer Diesel's briefs to the Iowa appellate courts, and the specific issue of just compensation pursuant to the Fifth Amendment to the United States Constitution was raised in its opening appellate Brief: "[T]he constitutional issue of whether Spencer Diesel's property was taken without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 18 of the Iowa Constitution is reviewed de novo." (Appellant's Brief, p. 17).

Petition for Writ, p. 9.

Spencer Diesel states the question presented for review is:

> Whether the Iowa Court of Appeals denied Petitioner just compensation pursuant to the Fifth Amendment to the United States Constitution for private property taken for public use.

There is not any quotation from the record showing this issue was raised in the Iowa courts. The City of Sioux City in accord with this Court's rules respectfully states that Spencer Diesel's claim it has preserved error is a "misstatement in the petition." *See* Rule 15(2).

Specifically, Spencer Diesel claims the issue was raised at trial by strenuous objection. No reference or quotations setting forth the objections is included in

the Petition as required by Rule 14.1g(i) as quoted above. Spencer Diesel next claims to have raised the issue in its appellate briefs. No such question was presented to the Iowa Courts by Spencer Diesel in any brief. In the brief to the Iowa Supreme Court (which under Iowa practice was the brief considered by the Iowa Court of Appeals) served October 18, 2006, the following issues are identified as being the questions presented for review:

I. The District Court Erred in Barring All Evidence of the Income Approach to the Valuation of Spencer Diesel's Property.

   A. Preservation of Error.

   B. Introduction.

   C. Spencer Diesel Should Have Been Allowed to Introduce Evidence Regarding the Value of the Property Based on the Revenue That Would Have Been Earned From the Parking Lot.

      1. There Were No Comparable Sales.

      2. Evidence Regarding the Income Approach to the Property Should Have Been Introduced Because it Falls Within Recognized Exceptions to the General Rule.

a. Evidence of the Income of the Parking Lot – An Income Producing Property – Should Have Been Admitted.

b. Evidence of Income Should Have Been Admitted Because of the Lease Exception.

II. The District Court Erred in Denying Spencer Diesel's Request for a Further Continuance and For Time to Obtain Experts.

III. The District Court Erred in Finding That the Value of Spencer Diesel's Property was $202,000.00.

Spencer Diesel Brief to Iowa Supreme Court, p. i-ii.

In Spencer Diesel's Application to the Iowa Supreme Court for Further Review the following issues are presented:

I. The Court of Appeals Erred in Affirming the District Court's Decision to Bar All Evidence of the Income Approach to the Valuation of Spencer Diesel's Property.

A. Introduction.

B. Spencer Diesel Should Have Been Allowed to Introduce Evidence Regarding the Value of the Property

Based on the Revenue That Would Have Been Earned From the Parking Lot.

1. There Were No Comparable Sales.

2. Evidence Regarding the Income Approach to the Property Should Have Been Introduced Because it Falls Within Recognized Exceptions to the General Rule.

    a. Evidence of the Income of the Parking Lot – An Income Producing Property – Should Have Been Admitted.

    b. Evidence of Income Should Have Been Admitted Because of the Lease Exception.

3. The City Waived its Ability to Argue Against the Income-Based Method of Valuing the Property and Should Have Been Estopped From Trying to Exclude the Evidence From Their Own Appraisals.

II. The Court of Appeals Erred in Affirming the District Court's Denial of Spencer Diesel's Request for a Further Continuance and For Time to Obtain Experts.

III. The Court of Appeals Erred in Affirming the District Court Finding That the Value of Spencer Diesel's Property was $202,000.

Spencer Diesel Application for Further Review, p. i-ii.

The only time Spencer Diesel mentioned the Fifth Amendment in either its Brief or Application for Further Review is on page 17 of its original (October 18, 2006) appellate brief. This is the lone citation to the record in support of the claim the federal question was presented to the Iowa courts and preserved for review. However, this sole mention of the Fifth Amendment is not made as part of any argument but under the section of the brief entitled Standard of Review, which is required by Iowa Appellate Rules. Iowa Rule 6.14(1)(f).

Additionally, as Sioux City noted in its brief to the Iowa Supreme Court (Sioux City brief page 11), this case was an appeal to Iowa District Court from a compensation commission award. The Petition to the Iowa District Court was filed by virtue of Iowa Code Section 6B.22 (2001). In such appeals the only question to be determined is the amount of damages which "shall be ascertained and entered of record." Iowa Code Section 6B.23 (2001). In Iowa challenges to matters other than valuation are brought by separate legal action. *See e.g., In Re Condemnation of Certain Rights*, 666 N.W.2d 137 (Iowa 2003), *Mann v. City of Marshalltown*, 265 N.W.2d 307 (Iowa 1978). This rule has now been codified. Iowa Code §6B.3A (2007). No

place in this Petition for Writ of Certiorari is there any showing of any separate action to raise any issue before any Iowa court, except the one issue allowed under the procedure Spencer Diesel used to invoke court jurisdiction, that is solely how much was the land worth.

It is important to note that the Petition filed in District Court, and never amended, has a single claim consistent with Iowa Code §6B.23:

> WHEREFORE, plaintiff has and does hereby appeal from the condemnation award of the Commission and ask that the damages be ascertained and fixed in the amount of $600,000 for the real property, all as provided by law, and for such other relief as the Court deems just and equitable under the premises.

Petition to District Court. Iowa Supreme Court App. P. 10.

There was not any claim raised of deprivation of any rights but merely a plea that damages for the taking be ascertained. Consistent with Iowa law, the Petition on appeal to the Iowa District Court never mentions the Fifth Amendment nor does it make any claim of any deprivation of a constitutional right to just compensation. Thus, not only was a constitutional claim never raised, such a claim could not have been raised under the procedure under which Spencer Diesel proceeded. The only question raised was the

value of the land, an evidentiary, not a constitutional question.

In summary, there is not any claim in any part of the argument made in any appellate pleading before any Iowa Appellate court that Spencer Diesel was deprived of just compensation under the Fifth Amendment to the Constitution of the United States. There is not any claim in any appellate pleading that any ruling by any Iowa court deprived Spencer Diesel of just compensation under the Fifth Amendment. Except for one passing reference to the Fifth Amendment regarding standard of review Spencer Diesel does not even mention the Fifth Amendment in any of its Iowa appellate pleadings. The present question was not presented to the Iowa courts and has not been preserved for review.

2. The decisions of the Iowa Appellate Courts are not inconsistent with prior rulings of this Court.

The primary basis upon which Spencer Diesel urges this Court to grant certiorari is an alleged variance with decisions of this Court. However, neither of the Iowa appellate rulings in this case are at variance with rulings of this Court. Contrary to the argument presented in support of granting the writ, both the trial court and Iowa Court of Appeals found there were comparable sales upon which to base a finding of value. As this Court has noted, valuation is an issue of fact. *Suitum v. Tahoe Regional Planning*

Agency, 520 U.S. 725, 117 S.Ct. 1659 (1997). Similarly in *United States v. Merz*, 376 U.S. 973, 84 S.Ct. 1131 (1964) this Court reviewed procedures in a federal eminent domain action and did not reject comparable sales as a method of determining just compensation by a commission as long as the commission was properly instructed and filed a report in accord with law.

Spencer Diesel does not cite any case from this Court, even by its own analysis, which is contrary to the rulings of the Iowa courts. In this Court's cases on just compensation in eminent domain actions it is recognized that just compensation may be based upon opinion evidence of comparable sales. *Suitum v. Tahoe Regional Planning* Agency, 520 U.S. 725, 742, 117 S.Ct. 1659, 1668 (1997). In the present case, there were sufficient current market transactions in the form of comparable sales for the trial court to make a decision upon the evidence. The trial court's actions in so doing do not arise to a federal constitutional question.

The present Petition is simply an effort by a plaintiff, who failed to make a necessary evidentiary showing, to convert its own failure into a federal constitutional question. The trial court in this case in reliance upon *Kurth v. Iowa Department of Transportation*, 628 N.W.2d 1 (Iowa 2001) ruled in limine that the evidence at trial would be limited to evidence from comparable land sales. The trial court did not admit evidence based on an income valuation approach but did allow an offer of proof on the point.

The Court was correct to do so. Rejection of the income valuation approach was proper because no business was actually conducted on the land being taken, thus all evidence regarding income was speculative. Moreover, there was not any business being taken for which compensation might be due. Iowa Court of Appeals Ruling App. 10. At no point did Spencer Diesel produce any expert witness (or designate an expert as required by Iowa rules) *id.* at 13, to establish that there were not any comparable sales, or that there were existing comparable sales that established a different or higher value, a point upon which the trial court commented:

> The parties waived their right to a jury trial at the final pretrial conference held on February 6. The court further directed plaintiff's counsel to place their income capitalization evidence and related exhibits and/or records in an offer of proof. Such evidence using various hypothetical rental rates and occupancy rates generated a stream of income capitalized at a rate of 6.7 percent suggested the property had a value of up to $600,000. These calculations were performed by the plaintiff's CPA, Robert Houlihan, and are shown in a number of exhibits admitted in the plaintiff's offer of proof. In light of pretrial rulings, the court expected the plaintiff would attempt to show in its case-in-chief and in cross-examination of the city's experts that the subject property was comparable to the sale of 1214-26 Fourth Street at a price of $13.46 per square foot or, perhaps, even

> higher, which would increase the subject property's valuation by 50 percent or $100,000. However, the plaintiff elected to continue with its theory that there were no sales of comparable property near April 23, 2003, and that this court's pretrial rulings and evidentiary rulings were in error and that the matter would be resolved on appeal.

App. 17.

The issues below were treated as evidentiary. The Iowa Court of Appeals held the evidence showed there were comparable sales and that exceptions to general rules which would allow admission of income evidence did not apply because the necessary conditions precedent were not shown to exist.

Spencer Diesel never claimed in the Iowa Appellate Courts that application of these rules deprived it of just compensation under the United States Constitution. There is not any Fifth Amendment constitutional claim in regard to the Court of Appeal's holdings concerning the admission or rejection of evidence in the Application for Further Review. There are not any rulings of this Court which are inconsistent with the evidentiary rulings of the Iowa courts. Nothing in the Iowa decisions is contrary to any cited ruling of this Court or contrary to the requirements of the Fifth Amendment. The Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

IVAN T. WEBBER
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, IA 50309-2231
Telephone: (515) 243-7611
Facsimile: (515) 243-2149
Attorneys for Respondent
The City of Sioux City, Iowa